

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

IN RE: . Chapter 11  
FTX TRADING LTD., et al., . Case No. 22-11068 (JTD)  
Debtors. . (Jointly Administered)  
ALAMEDA RESEARCH LLC, FTX . Adv. Pro. No. 23-50419 (JTD)  
TRADING LTD., WEST REALM  
SHIRES, INC., AND WEST  
REALM SHIRES SERVICES INC. .  
(D/B/A FTX.US), .  
Plaintiffs, .  
v. . Courtroom No. 5  
DANIEL FRIEDBERG, . 824 North King Street  
Defendant. . Wilmington, Delaware 19801  
Thursdays, February 22, 2024  
1:00 p.m.

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1 (Proceedings commence at 1:02 p.m.)

2 THE COURT: Good afternoon, everyone. Thank you.

3 Please be seated.

4 MR. LANDIS: Good afternoon, Your Honor. May I  
5 please the Court, Adam Landis from Landis Rath & Cobb on  
6 behalf of FTX Trading, Ltd., and its affiliated debtors.

7 Your Honor, this afternoon we are going to be  
8 working off the amended agenda that we filed this morning.

9 Items 1 through 9 have been adjourned. Number 10 was  
10 withdrawn. Items 11 through 20 have been resolved and orders  
11 have been entered. We are grateful for the entry of those  
12 orders.

13 That takes us to two matters that are going  
14 forward. Item No. 21 is the Anthropic sale motion and Item  
15 No. 22 is the status conference with respect to the U.S.  
16 Trustees motion for an examiner.

17 THE COURT: Okay.

18 MR. LANDIS: I am going to yield the podium to Mr.  
19 Dietderich from Sullivan & Cromwell with respect to Item 21,  
20 the Anthropic motion.

21 THE COURT: Thank you.

22 MR. DIETDERICH: Good afternoon, Your Honor. For  
23 the record Andy Dietderich, Sullivan & Cromwell.

24 Your Honor, Item 21, the sale with Anthropic, we  
25 have resolved, as reflected in a revised form of order

1 submitted to the Court, concerns of the U.S. Trustee, the  
2 official committee, the ad hoc committee of customers, and  
3 Anthropic. We have two pending objections, Your Honor. We  
4 have not had substantive contact with the objecting parties.  
5 I am not sure if they are here today and plan to speak or  
6 not.

7 THE COURT: Someone raised their hand.

8 MR. DIETDERICH: From the debtors' perspective,  
9 you know, we kind of stand by our position on the papers  
10 which we think is relatively straightforward. I would note  
11 two things generally about the relief requested.

12 First, we had originally sought preapproval of the  
13 disposition of Anthropic thinking we could be in a situation  
14 in which we might be dribbling the position out over time or  
15 making a number of small sale decisions. I think after  
16 conversation with the stakeholders and, in particular, our  
17 investment banker, we have withdrawn the preapproval request.

18 So, the motion in front of you now is,  
19 effectively, an arrangement to shorten notice to allow us to  
20 consummate the sale with a shorter period of time between  
21 signing and closing which is helpful for the marketing  
22 process, but all stakeholders will have notice of the sale  
23 and an opportunity to be heard if they have an objection.

24 The second thing I would note is we do believe, as  
25 the debtor, that we can, as of right, sell this position

1 without Anthropic's consent; however, Anthropic disagrees.  
2 The current relief contemplates a consensual sale with  
3 Anthropic and we have negotiated with Anthropic a window  
4 where our disposition activity won't interfere with their own  
5 capital raising activity. And that relationship between what  
6 we are doing and what they might be doing from a capital  
7 raising perspective in the future is an important  
8 consideration of, I would say, the collaborative method that  
9 we have to sell the Anthropic position with the support of  
10 Anthropic.

11                   With that, Your Honor, I don't know if you have  
12 questions, but I would, you know, cede the podium to anybody  
13 else who wishes to speak about today's motion.

14                   THE COURT: Thank you.

15                   MR. SASSON: Good afternoon, Your Honor. Isaac  
16 Sasson from Paul Hastings on behalf of the official committee  
17 of unsecured creditors.

18                   Just to echo what Mr. Dietderich said, we are  
19 supportive of the debtors sale at this time. With Your  
20 Honor's permission, we would like to reserve our comments  
21 until after the objectors speak.

22                   THE COURT: Thank you.

23                   MR. SASSON: Thank you, Your Honor.

24                   MS. BRODERICK: May I please the Court, Your  
25 Honor, Erin Broderick of Eversheds Sutherland on behalf of

1 the ad hoc committee of non-US customers of FTX.com.

2 We are also supportive of approval of the debtors'  
3 motion and I would similarly ask to make comments after the  
4 objections are heard.

5 THE COURT: Okay. Thank you.

6 Anyone else before we go to the objectors?

7 (No verbal response)

8 THE COURT: Okay. Objectors.

9 MS. HUMISTON: Good afternoon, Your Honor. May I  
10 please the Court, Shannon Humiston from McCarter & English on  
11 behalf of certain customers of FTX.com. With me in the  
12 courtroom today is David Adler. His admission has been -- he  
13 has been admitted *pro hac vice* in these proceedings and with  
14 the Court's permission I would like to cede the podium to Mr.  
15 Adler.

16 THE COURT: Thank you.

17 MS. HUMISTON: Thank you.

18 MR. ADLER: Your Honor, David Adler from McCarter  
19 & English on behalf of certain FTX creditors.

20 We filed an objection to the proposed sale. Having  
21 heard the debtors' comments this morning one of the thoughts  
22 that occurs to me is that if we are dealing with,  
23 effectively, a motion to shorten notice we would like to  
24 obtain some documents from the debtor. We think maybe if  
25 we're shortening time and we're going to have another hearing

1 on this that might be the appropriate time for us to go  
2 forward, but we are prepared to go forward today.

3 THE COURT: Let me hear from Mr. Dietderich.

4 MR. DIETDERICH: Thank you, your Honor. I should  
5 be clear, right, we have a procedure to shorten notice for  
6 objections by objecting parties, but in the absence of an  
7 objection there is no hearing. To the extent that the  
8 objecting parties seek to raise a property argument we  
9 believe the time for that has passed and we would like that  
10 resolved today. We don't intend to have a hearing on  
11 customer property issues on shortened notice. So, I think the  
12 burden is very much on Mr. Adler, as he expected today, to  
13 show why this train should be derailed because of a property  
14 interest in the assets being sold.

15 THE COURT: Well, isn't the -- the form of order  
16 that I saw says that any property interest that might attach  
17 to the assets being sold passes through to the proceeds of  
18 assets.

19 MR. DIETDERICH: Correct.

20 THE COURT: So, I don't know what -- what is the  
21 issue, Mr. Adler. The sale is going to go forward. If you  
22 have an objection to the sale process, how that sale  
23 proceeded, you think its unfair for some reason, you have  
24 some basis for an objection other then property rights you  
25 could raise those on the expedited basis. If you are going

1 to object and say, well, its our property its going to be  
2 subject to the -- the proceeds are going to have that  
3 property interest attached to it and you will have the right,  
4 at a later time, to assert that claim.

5 MR. ADLER: I think, Your Honor, that latter issue  
6 was not very clear in the motion itself. We are not seeking  
7 to bring back the property to the customers today. We just  
8 want to make sure that our rights are preserved and to the  
9 extent that the sale proceeds are kept in a segregated  
10 account and our rights are reserved to claim that this is the  
11 -- these are the proceeds from customer property I don't  
12 think we have an objection to the sale going forward as long  
13 as we reserve our rights.

14 MR. DIETDERICH: To be clear, the proceeds are not  
15 segregated. We do have a substantial amount of cash in the  
16 estate. Paragraph 4 of the order does say that to the extent  
17 there is a property interest that attached to the proceeds of  
18 the sale, but we don't intend to hold them in a segregated  
19 account. We have sufficient cash that it won't be an issue.

20 THE COURT: Well, I guess the question, I am  
21 anticipating Mr. Adler's question, is whether or not they can  
22 trace those funds later on. So, there is a question about  
23 whether these particular proceeds are from the sale of assets  
24 that belong to somebody else. How do we trace those funds  
25 without running into the problem of the lowest intermediate

1 balance test.

2 MR. DIETDERICH: Its cash, right. And we have an  
3 adequate amount of cash. So, if you just look at it -- you  
4 could look at it on lowest intermediate balance kind of with  
5 that lens. We should have adequate in the estate to pay the  
6 -- we know how much money it was, what the sale price, and we  
7 know that went into our accounts. And if they show that they  
8 have a property interest they can presumably trace the  
9 property in our consolidated accounts.

10 Its not segregated in any way now, nor any of our  
11 other assets. To the extent that there is no evidence in  
12 front of the Court that Mr. Adler's clients have any interest  
13 in property in the Anthropic shares. We are selling the  
14 Anthropic shares as we are selling everything and putting the  
15 money in the bank. There is no difference, I would think,  
16 between Mr. Adler's clients entitlement, if such exists, to  
17 the proceeds of the disposition of Anthropic then to the  
18 disposition of any other property interest of the estate, all  
19 of which are going in to blended unsegregated accounts.

20 There has been no allegation in his papers that  
21 Anthropic is special in any way compared to the other assets  
22 that we are disposing of. There is no effort to trace the  
23 source of funds for Anthropic. There is no discovery or  
24 informational requests for the debtors at any time over the  
25 last 14 months when we let the world know we're selling

1 Anthropic for Mr. Adler or his clients asking for any  
2 information related to Anthropic.

3                   So, it's a little bit of a slippery slope if we  
4 start to say that everything we sell has to go into a  
5 segregated account when we're selling everything and putting  
6 all of the money into a blended account. Again, if there is  
7 something specific about Anthropic as it relates to the  
8 holdings of Mr. Adler's clients, of which we are not aware,  
9 the burden is on him to show it. He has not shown it.

10                  So, I would submit that on that basis there is  
11 certainly an adequate protection of the interest in property  
12 by acknowledging that the proceeds will go into a segregated  
13 account and if they're correct we will figure out what to do  
14 with it.

15                  THE COURT: Mr. Adler.

16                  MR. ADLER: Your Honor, I don't really see what  
17 the issue is about establishing a separate account with  
18 respect to these proceeds. The second argument is there is  
19 something special about Anthropic and we did say it in our  
20 papers which is that the proceeds from the customer property,  
21 from the customer accounts, were literally traced by an  
22 expert during the Sam Bankman-Fried trial and there is an  
23 exhibit that the government put up literally tracing the \$500  
24 million from FTX Trading down to Alameda Ventures, I believe.

25                  This is one example, Your Honor, where the

1 government and other parties have literally sat and traced  
2 the funds from customer accounts to the purchase of  
3 Anthropic. So, you know, I am not going to get into the  
4 issues of really why we are here today. I will just note that  
5 I have been retained in the last few weeks. I was involved  
6 in another related issue at the beginning of the case, but,  
7 you know, we don't have a plan yet.

8 I mean, I don't see where the prejudice is in the  
9 fact that this has gone on for or the FTX case has been  
10 around for 14 months. They are selling Anthropic. Anthropic  
11 is a special category of an asset where the funds were  
12 literally traced during the trial and my request is that  
13 those funds be put in a segregated account.

14 THE COURT: Well, I think one of the problems you  
15 might have is maybe there was, maybe there wasn't, I don't  
16 know the tracing that occurred in the criminal trial with the  
17 Southern District, but it was only \$500 million and there  
18 were billions of dollars taken out of the account. So, how  
19 would I know your client's funds were the ones that were  
20 transferred?

21 MR. ADLER: I think, Your Honor, this goes to a  
22 larger point about the claims of customers of that entity.  
23 With respect to my group that is subject to a further  
24 tracing, I suppose, but, you know, we are talking about a  
25 fund here of customer property that is literally directly

1 traceable to Anthropic.

2 THE COURT: But you can't speak on behalf of  
3 parties you don't represent.

4 MR. ADLER: That is correct, Your Honor.

5 THE COURT: There is no class action here.

6 MR. ADLER: That is correct. But, again, in order  
7 to -- I think we can deal with that issue as we move forward  
8 towards confirmation, but I don't think it is a unreasonable  
9 request to have those funds put in a segregated account for  
10 the time being such that we can start the process that we  
11 have to start regarding tracing.

12 THE COURT: Well, I think Mr. Dietderich's point  
13 is there has been a lot of sales of a lot of assets and if  
14 they set up separate accounts for each one of them it's going  
15 to become unwieldy. I just don't think as long as there is a  
16 way to trace these particular funds to the account and as  
17 long as we don't have an issue of the funds in the account  
18 falling below the lowest intermediate balance test then I  
19 think we're okay. I am going to take Mr. Dietderich at his  
20 word that its not going to do that, we're not going to fall  
21 below the lowest intermediate balance because there is plenty  
22 of money in the account.

23 How much do we have in the account at this point,  
24 generally? Just a rough estimate.

25 MR. DIETDERICH: Well, I will -- that's actually a

1 good question. I don't have any of my usual crutches in  
2 Court with me today. We will send a text right now to get a  
3 better answer for that.

4 THE COURT: All right.

5 MR. DIETDERICH: We have well over -- if its \$500  
6 million we have multiples of that.

7 THE COURT: I know there's been other sales that  
8 have happened.

9 MR. DIETDERICH: Absolutely, Your Honor. We have  
10 many billions of dollars.

11 THE COURT: Are the expenses of the bankruptcy  
12 being paid out of the same account or is this -- are these  
13 funds in a separate account that is not used to pay the  
14 proceeds of the bankruptcy process?

15 MR. DIETDERICH: So, we have a master sweep  
16 account and then we have sweep accounts in the silo  
17 structure. Remember the silo structure from the beginning.

18 THE COURT: Right.

19 MR. DIETDERICH: The case expenses are being paid,  
20 really, on behalf of the various debtors under an allocation  
21 rule. So, all of the cash is being charged administrative  
22 expenses, but, again, when I say there is adequate cushion, I  
23 mean on any projection of administrative expenses we have  
24 billions of dollars of cash. \$6.4 billion is the answer.

25 THE COURT: Okay.

1                   MR. DIETDERICH: I would say one other thing, Your  
2 Honor, that -- the other observation I would offer is there  
3 is, obviously, no evidence of any -- of what Mr. Adler said  
4 today in the record, nor was there an attempt to put anything  
5 in evidence on his behalf on the record.

6                   The -- whatever -- what purchased Anthropic was  
7 also funds that were not segregated for the benefit of  
8 customers. So, we are dealing with unsegregated funds  
9 purchasing Anthropic, putting it back in the generally  
10 unsegregated accounts. But I think Your Honor makes an  
11 important observation which is over \$6.4 billion of cash will  
12 be able to apply -- if there is a determination that for some  
13 reason Mr. Adler's clients had an interest in the Anthropic  
14 shares, and it was sold, and those proceeds came in, and that  
15 interest is sufficient to give Mr. Adler's clients some kind  
16 of priority over everybody else with respect to those  
17 proceeds we will know the amount of money that came in and  
18 will have a \$6.4 billion buffer because the \$6.4 billion does  
19 not yet include the proceeds of the sale of Anthropic.

20                  THE COURT: Mr. Adler.

21                  MR. ADLER: Just listening to Mr. Dietderich about  
22 sweeps raises a concern to me that these funds are, whatever  
23 account they're in, getting swept back and forth and that  
24 could raise further tracing issues that I would -- you know,  
25 that I don't think are appropriate or necessary. So, I don't

1 know if there is a way to deal with that problem, but if  
2 there is money in one account that is getting swept into  
3 another account and that's occurring on a daily basis the  
4 process becomes, you know, much, much more cumbersome to  
5 demonstrate, you know, the tracing. So, I do have an issue  
6 with sweeping as well.

7 THE COURT: Well, it does raise an interesting  
8 issue or a complicated issue. If the funds that come in from  
9 the sale of Anthropic go into a master account and then those  
10 funds get swept into other accounts the lowest intermediate  
11 balance test is going to apply to the funds that they  
12 originally -- the account that it originally went into which  
13 could be below the lowest intermediate balance which creates  
14 a problem.

15 MR. DIETDERICH: Well, the way the system works is  
16 ultimately things are swept up into the master account  
17 pursuant to the cash management order. We are keeping,  
18 obviously, meticulous records of transfers during the case.  
19 Each of the transfers constitutes superpriority  
20 administrative loan by one estate back to the other, right.  
21 So, its not like its being transferred out. Its being  
22 collected for the purposes of running a consolidated account  
23 which is in everybody's interest to run a consolidated  
24 account because its cheaper and liquidity is pooled.

25 We can't possibly run the case by having separate

1 pools of liquidity corresponding to every asset we sell. So,  
2 the solution in the cash management order, which contemplated  
3 exactly this question, including customer property  
4 allegations, is that we have a master pooling account, it  
5 sucks up liquidity, again, under meticulous record keeping,  
6 that master account is the primary source of liquidity in the  
7 case. That is the \$6.4 billion I mentioned, right, but we  
8 know where it came from and to the extent that anybody has a  
9 property interest they, effectively, have a charge against  
10 the master pool.

11                   THE COURT: Well, here is my concern because I was  
12 involved in the Diocese of Wilmington bankruptcy case when I  
13 was in private practice and this issue came up where the  
14 Diocese was taking funds from the various parishes, putting  
15 them into a master account, and then sending it off into  
16 individual accounts for each of the various parishes. Judge  
17 Sontchi ruled that the lowest intermediate balance test  
18 applied to the master account. Even though we had an expert  
19 who could trace those funds directly all the way through he  
20 said not good enough; you violated the lowest intermediate  
21 balance test and all that money got swept up into the estate.  
22 So, that is what I am concerned about.

23                   MR. DIETDERICH: Well, Your Honor, the difference  
24 there is that was presumably prepetition.

25                   THE COURT: Yes, it was.

1                   MR. DIETDERICH: Yeah, so its prepetition. So, in  
2 the administrative period, again we are keeping records --  
3 our job in the administrative period is to protect  
4 everybody's entitlements as of the petition date. So, we are  
5 able to recreate administratively what everyone is entitled  
6 to on the petition date.

7                   I don't think that we are going to take a position  
8 that people can't -- you know, tracing is a relevant question  
9 for the prepetition period. In the administrative period for  
10 how we use cash presumed to the Court order, the Court's  
11 order applies. Your Honor has already held that to the  
12 extent we are taking money from one debtor under our cash  
13 management procedures and it belongs in a different place we  
14 put it back with an administrative priority.

15                  THE COURT: That makes sense to me, Mr. Adler.

16                  MR. ADLER: I am a little confused, Your Honor,  
17 but I think that we are, sort of, talking about minutia here  
18 and what I think serve everyone well is for me and Mr.  
19 Dietderich to work on the proposed form of order in terms of  
20 that provision that keeps, you know, everyone's rights in the  
21 proceeds preserved and mechanically how that will function in  
22 real life.

23                  I mean, I am also concerned that if it goes into  
24 an account and that account gets swept out that the lowest  
25 intermediate balance will be zero. But I do think that there

1 is some benefit in --

2 THE COURT: I think the point Mr. Dietderich is  
3 making is that pursuant to my previous orders in this case  
4 that process has been approved by the Court with the idea  
5 that funds that get transferred to one debtor or another  
6 debtor turn out to belong somewhere else will automatically  
7 be shifted back and forth without regard to the lowest  
8 intermediate balance test. It doesn't apply.

9 MR. ADLER: Right. Instead there is a  
10 superpriority administrative claim that is in place --

11 THE COURT: Between the debtors.

12 MR. ADLER: -- between the debtors. It sounds  
13 like it addresses the problem, Your Honor, but I am trying to  
14 run through my head. Obviously, the easiest solution is a  
15 segregated account. If there is not a segregated account  
16 then the cash management order, presumably, it sounds like  
17 protects these rights but, you know, I don't want to be in a  
18 position where if we do succeed on tracing that, you know, we  
19 are trying to then establish a tracing within the debtors'  
20 structure. That is my big concern.

21 THE COURT: Well, based on what I have heard today  
22 I am going to be very upset if someone tries to argue the  
23 lowest intermediate balance test.

24 MR. ADLER: Okay, Your Honor. On that note, I  
25 think I would like an opportunity to just discuss the form of

1 order with the debtors.

2 THE COURT: We can take a break and maybe talk  
3 about it and I will come back on in a minute.

4 Let me just see if anybody else wants to be heard  
5 on the issue.

6 (No verbal response)

7 THE COURT: Okay. You want to take like a 10-  
8 minute recess, Mr. Dietderich, and speak to Mr. Adler?

9 MR. DIETDERICH: Sure. We can do that. Thank  
10 you, Your Honor.

11 THE COURT: Thank you.

12 (Recess taken at 1:25 p.m.)

13 (Proceedings resumed at 1:36 p.m.)

14 THE COURT: All right. Where are we?

15 MR. DIETDERICH: Thank you, Your Honor. Andy  
16 Dietderich for the debtors for the record.

17 Your Honor, we have an agreed language for the  
18 order. We are going to make a little tweak because it  
19 occurred to me that we could be more precise and I think  
20 Mr. Adler has agreed with this language after looking at the  
21 cash management order. So I'll read it to you and then we'll  
22 submit it in a revised form of order.

23 THE COURT: Okay.

24 MR. DIETDERICH: In paragraph 4 of the order, we  
25 have the language that Your Honor cited about liens, claims,

1 encumbrances, and interests attaching to the proceeds. But  
2 rather than just say that they'll attach to the proceeds of  
3 the sale, we're going to add a parenthesis that says they  
4 also attach to any debtors' rights against any other debtor  
5 under the cash management order, closed paren. Meaning, that  
6 if the sale proceeds come into a debtor and the debtor uses  
7 the centralized cash management system, the security interest  
8 attaches to that debtor's interest against the master pool.  
9 So, effectively, the deposit becomes secured if that debtor,  
10 you know, banks with one of the other debtors.

11 The other change that we would make is just at the  
12 very end of that paragraph where you see that rights to  
13 claims, defenses, and obligations to any of the debtors and  
14 all interested parties are reserved, we would agree to add,  
15 at Mr. Adler's request, the debtors, comma, the objectors,  
16 and all other interested parties.

17 So I think that resolves, at least, the objection  
18 of Mr. Adler's clients and we'll submit a revised form of  
19 order.

20 THE COURT: Okay. Thank you. I'm satisfied with  
21 the changes.

22 MR. ADLER: Your Honor, David Adler. I just  
23 wanted to note for the record that I did go through that  
24 language and based on my review of the cash management order,  
25 it looks like it does protect the interests and, obviously,

1 that based on that cash management order, we're not talking  
2 about lowest, intermediate tests the way it's structured.

3 THE COURT: Okay.

4 MR. ADLER: So that's all I have to say.

5 THE COURT: Thank you, Mr. Adler.

6 All right. Anything else on this motion?

7 (No verbal response)

8 THE COURT: Okay. I'm satisfied, based on what  
9 I've heard and the representations in court today, that the  
10 proposed order is appropriate. Subject to receiving the  
11 revised form of order under COC, I will enter the order.

12 MR. DIETDERICH: Your Honor, I think the next item  
13 on the agenda is the status conference related to the  
14 examiner motion by the U.S. Trustee.

15 THE COURT: Okay.

16 MR. HACKMAN: Good afternoon, Your Honor.

17 THE COURT: Good afternoon.

18 MR. HACKMAN: May I please the Court? Ben Hackman  
19 for the U.S. Trustee.

20 We asked for a status conference to update Your  
21 Honor on developments since the status conference we had last  
22 month and to get clarification from Your Honor about the next  
23 steps in the examiner appointment.

24 Since the last status conference on January 24th,  
25 the parties to the examiner appeal asked the Third Circuit to

1 expedite issuance of the mandate. The Third Circuit issued  
2 its mandate on February 12th. It's filed on the Bankruptcy  
3 Court docket at Item 7301.

4 The next day, on February 13th, we reached out to  
5 the debtors, the Official Committee, Ad Hoc Committee, and  
6 JOLs with a proposed form of order. It was one sentence. It  
7 directed the United States Trustee to appoint an examiner  
8 under Section 1104(c)(2). Debtors' counsel advised that they  
9 did not agree to that form of order.

10 The following day, on February 14th, the U.S.  
11 Trustee proposed to add additional language to the order  
12 clarifying that scope, duration, and cost would be clarified  
13 at the appointment hearing, but we did not receive a response  
14 to our proposal, and so we've requested a status conference  
15 with Your Honor today to discuss the matter.

16 At the January 24th status conference, we  
17 understood Your Honor to say that the United States Trustee  
18 identifies who the examiner is and appoints the person and  
19 then asks the Court to approve the appointment. The United  
20 States Trustee files an application to approve the  
21 appointment under Rule 2007.1(c). We understood Your Honor  
22 wanted to address approval of the appointment, as well as  
23 scope, cost, and duration at one hearing versus coming back  
24 to set scope, cost, and duration later.

25 The U.S. Trustee is trying to comply with the

1 Third Circuit's instructions, with Your Honor's comments, and  
2 with the Bankruptcy Code and Rules and to that end, we filed  
3 notice of a proposed form of order at Docket Item 7597. It  
4 directs the U.S. Trustee to appoint an examiner. It says the  
5 scope, cost, degree, and duration will be addressed at the  
6 hearing on the U.S. Trustee's application to approve the  
7 appointment.

8 The debtors filed a competing form of order this  
9 morning at Docket Item 7830. The U.S. Trustee objects to  
10 entry of that order. The order is objectionable because it  
11 does not comply with Section 1104(d) or Bankruptcy  
12 Rule 2007.1(c).

13 The debtors' order says that the U.S. Trustee is  
14 directed to "seek the appointment" of an examiner.  
15 Section 1104(d) of the Bankruptcy Code says the U.S. Trustee  
16 shall appoint. It does not say the U.S. Trustee shall seek  
17 to appoint. It says the U.S. Trustee shall appoint an  
18 examiner, subject to the Court's approval.

19 That takes us to Rule 2007.1(c). It provides that  
20 an order approving the appointment of a trustee or an  
21 examiner under Section 1104(d) of the Code shall be made on  
22 application of the United States Trustee. The application  
23 shall state the name of the person appointed.

24 Further down, it says the application shall be  
25 accompanied by a verified statement of the person appointed,

1 setting forth the person's connections with the debtor,  
2 creditors, any other party in interest, and so on.

3 So Rule 2007.1(c) also does not refer to the U.S.  
4 Trustee seeking the appointment of an examiner. It says the  
5 U.S. Trustee shall make an application, which application  
6 shall state the name of the person appointed.

7 It seems to us that the debtors want to have their  
8 hand in the U.S. Trustee's selection process. The debtors do  
9 not have that right. They can consult with our office, and  
10 we have had consultation with them, but the debtors do not  
11 get a say in who the examiner is.

12 To give the debtors a say in who the examiner is,  
13 is highly problematic for a few reasons. First, it has no  
14 basis in the Bankruptcy Code or the Bankruptcy Rules.  
15 Second, the debtors have been steadfastly anti-examiner  
16 throughout this case. And, third, the Third Circuit wrote in  
17 its opinion that the Code also forbids a debtor-in-  
18 possession, the quintessential insider, from performing the  
19 duties of an examiner and investigating itself.

20 Finally, we think the debtors' proposed form of  
21 order is objectionable because it leaves open who actually  
22 makes the appointment. The debtors' order would direct the  
23 U.S. Trustee to seek the appointment of an examiner.

24 Who actually makes the appointment? The Court?  
25 Someone else?

1           With respect, we think the language of the Code  
2 and the legislative history make clear that the Court does  
3 not have a role in deciding who the examiner is on the front  
4 end; rather, the Court approves the U.S. Trustee's  
5 appointment of an examiner on the back end.

6           As the First Circuit wrote in, In re Plaza de  
7 Diego Shopping Center, Inc., it's 911 F.2d 820, 830 (1st Cir.  
8 1990):

9           "The power to nominate is not the power to  
10 appoint, and by relegating the U.S. Trustee to the role of  
11 nominating three candidates for trustee, the Court deprived  
12 the U.S. Trustee of his right and power under the statute to  
13 appoint the operating trustee."

14           That, in essence, is what we understand the  
15 debtors are trying to do with their form of order here: Have  
16 the U.S. Trustee nominate a candidate, but not appoint.

17           The U.S. Trustee has conducted his due diligence  
18 on the examiner appointment. We conducted and completed  
19 interviews. We performed the statutorily required  
20 consultation with the parties. We will be in a position to  
21 file the Rule 2007.1(c) application soon. We do not want to  
22 delay it. Ideally, we would like to have that heard at the  
23 March 13th or March 20th hearing before Your Honor, but we  
24 have not yet been formally directed to appoint.

25           We need an order directing us to do that. That is

1 why we submitted to the form of order that we did. We think  
2 our form of order is simple, uncontroversial, and a necessary  
3 step in this process. But it seems that we're at an impasse  
4 with the debtors. We believe Your Honor can and should enter  
5 the form of order that we have filed at Docket Item 7597.

6 We would respectfully submit that it effectuates  
7 the Third Circuit's instructions on remand and allows the  
8 U.S. Trustee to proceed with the appointment.

9 Unless Your Honor has any questions, that's all I  
10 have.

11 THE COURT: Would you agree, I mean, if you look  
12 at 1104(d), it says the U.S. Trustee shall appoint, subject  
13 to Court approval.

14 You're not saying that the debtors or any other  
15 party in interest doesn't have a right to object once you  
16 seek the appointment or once you appoint the examiner?

17 MR. HACKMAN: I don't think we would contest that  
18 in this case under these facts and circumstances, given Your  
19 Honor's comments at the prior status conference that you  
20 wanted the appointment, as well as scope, cost, and duration  
21 to be addressed at one hearing.

22 THE COURT: Right. Well, my point is that even  
23 though you get to appoint somebody, I don't have an issue  
24 with -- that 1104(d) says the U.S. Trustee appoints somebody  
25 after consultation with the interested parties. So, you

1 should have consulted with the debtors and the committee.

2                   But it also says subject to Court approval, which,  
3 to me, indicates that if someone, any party in interest  
4 objects to a particular appointment, they could raise that  
5 objection at the time of the appointment, which would have to  
6 be done by motion. I mean, the only way to do it, the only  
7 way you could get it in front of me is to file some kind of a  
8 motion that says, Here's -- we're appointing this person,  
9 subject to any objections the parties might raise.

10                  MR. HACKMAN: I don't know that we agreed that  
11 a 2007.1(c) motion application by itself would be a contested  
12 matter. I think if it's simply seeking approval of the  
13 appointment, the Court's role is to evaluate the  
14 disinterestedness of the candidate, confirm their  
15 qualifications that they're appropriate for the  
16 appointment --

17                  THE COURT: And how do I do that unless parties  
18 can come forward and tell me? What if the debtor knows that  
19 the person you're appointing has a conflict? And they've got  
20 to tell me. I've got to know. I'm not going to know that  
21 unless they tell me.

22                  MR. HACKMAN: So, with the application, there  
23 would be a statement from the appointee affirming their  
24 disinterestedness and making a showing that they're a  
25 disinterested person, as defined by the Bankruptcy Code.

1                   THE COURT: Well, there's instances where someone  
2 has been appointed and then they found out they actually did  
3 have a conflict that they didn't disclose. So if somebody  
4 has some information that they want to disclose that would  
5 lead me to believe this person is not disinterested, how do I  
6 get that information?

7                   MR. HACKMAN: I don't dispute that the debtors, if  
8 they believe the person were not disinterested, could raise  
9 that issue with Your Honor at the hearing.

10                  THE COURT: Okay. So what is it? I'm just trying  
11 to -- I mean, the language -- I wasn't actually satisfied  
12 with the language either party proposed.

13                  So, how do we get this in front of me so that I  
14 can decide, one, this person meets the requirements of the  
15 Code, he or she is disinterested, and I approve the  
16 appointment and also address the issues of scope, duration,  
17 and cost of any investigation that's going to happen? How do  
18 I do that, because nothing in the Code tells me how to do  
19 that.

20                  MR. HACKMAN: The Code says -- well, at this  
21 point, we have a directive from the Third Circuit to order  
22 the appointment of an examiner. Our view is that the U.S.  
23 Trustee makes that appointment. I believe --

24                  THE COURT: I got that part. I got that part.

25                  MR. HACKMAN: -- I believe the Court could enter

1 its own order directing the U.S. Trustee to appoint, if it  
2 wanted to. I don't know that the appointment order itself  
3 needs to be a contested matter, but we need the order to say  
4 the U.S. Trustee is directed to appoint.

5 THE COURT: Well, I don't have an issue with that.  
6 I think the U.S. Trustee does have -- the Code is pretty  
7 clear. It says 1104(d) says:

8 "The United States Trustee, after consultation  
9 with the parties in interest shall appoint, subject to the  
10 Court's approval, one disinterested person."

11 So, yes, you get to appoint somebody. But if  
12 someone -- I have to have some kind of a mechanism that  
13 allows me to hear from people who think this particular  
14 person that you have appointed is not disinterested or does  
15 not otherwise meet the requirements of the Code, and so they  
16 can weigh in on issues of the scope, duration, and cost of  
17 the investigation, because I do want to hear from parties on  
18 that. I think it's important.

19 MR. HACKMAN: We anticipated that all of those  
20 issues would be addressed in the Rule 2007.1(c) application.  
21 That would be heard all at once, as soon as Your Honor would  
22 be available.

23 THE COURT: Okay. Well, I'm looking at -- well,  
24 let me hear from the debtors on this issue.

25 And it does say, "shall appoint," and I've already

1 been told by the Third Circuit, "Shall means shall," so...

2 MR. BROMLEY: Your Honor, I think it's important  
3 to look at what the Third Circuit said, right.

4 THE COURT: Yes.

5 MR. BROMLEY: The Third Circuit said that, as is  
6 appropriate, does not modify "shall appoint."

7 But the Third Circuit was very clear that the  
8 phrase "as is appropriate" in Section 1104(c) means the Court  
9 retains broad discretion to direct the examiner's  
10 investigation, including its scope, degree, duration, and  
11 cost, and it cites to Norton's on Bankruptcy.

12 So what we have, the Third Circuit having done  
13 here, it has done two things. One, it has told us  
14 that 1104(c) (2) says that "shall appoint" is not modified by  
15 "as is appropriate." But that the examination is modified by  
16 "as is appropriate."

17 And so, we are now somewhat upside down in  
18 process, because going forward, I think it's clear in the  
19 Third Circuit under this decision, that when a motion is made  
20 to appoint an examiner, you have to, one, seek the  
21 appointment of an examiner and, two, in that same motion, you  
22 have to ask and describe scope, degree, duration, and cost  
23 for the Court in an 1104(c) (2) hearing to determine whether  
24 or not the proposed scope, degree, duration, and cost are  
25 appropriate.

1           In this circumstance, when we had the motion to  
2 appoint the examiner last year, we asked prior to the  
3 hearing, and you asked at the hearing, what was the proposed  
4 scope that the U.S. Trustee was looking for? Prior to the  
5 hearing, the U.S. Trustee refused to tell us what the scope  
6 was. In the pretrial order, we mentioned, it's specific, the  
7 language that the U.S. Trustee did agree to that one of the  
8 questions for the Court was whether or not scope mattered?

9           And you -- Your Honor did ask counsel for the U.S.  
10 Trustee about scope at the hearing. But that was not  
11 addressed in the order.

12           What the Third Circuit has now said is that the  
13 order that was entered by Your Honor, which denied the  
14 appointment of an examiner is reversed and remanded.

15           So when we drafted this form of order, we simply  
16 said that the motion that was up last year is granted. Now,  
17 that motion did not seek any information, any guidance at all  
18 with respect to scope, degree, duration, or cost, and now the  
19 Third Circuit has told us that when an examiner is being  
20 appointed, you need to take that into account.

21           So, I don't mind, right, if the order says that  
22 under 1104(d), the examiner -- that the U.S. Trustee is  
23 directed to appoint an examiner, subject to Court approval,  
24 and that there will be a subsequent hearing with respect to  
25 scope, degree, duration, and cost.

1                   The question as to the rest of what Mr. Hackman  
2 said is very troubling, right, because the U.S. Trustee's  
3 view of consultation is akin to the questioning that one  
4 might have expected from a Soviet border guard, right. What  
5 we are talking about in consultation is basically, here is a  
6 black box. In this black box, there are names. People have  
7 solicited interest. They have contacted the U.S. Trustee's  
8 Office. They have submitted statements of interest and,  
9 perhaps, applications.

10                  We don't know who was in that box. We don't know  
11 what has been submitted, what they have said.

12                  The U.S. Trustee says, Do you have any views on  
13 who should be appointed as an examiner?

14                  We specifically said, Would you please tell us who  
15 has submitted indications of interest? Some people contacted  
16 us, but certainly not all of them. We don't have the  
17 information, except in a couple of circumstances that people  
18 have submitted. We have no context whatsoever.

19                  We made two formal questions to Mr. Hackman and  
20 his colleagues on the phone: Please tell us who has  
21 submitted indications of interest and please tell us who  
22 you're interviewing. Once we have that information, we can  
23 give you a reaction. We'll take that under advisement.

24                  We received silence in response. We don't know  
25 who's been interviewed. We do know people have been

1 interviewed because Mr. Hackman just told us that people have  
2 been interviewed.

3 On that phone call, which was the, quote,  
4 consultation phone call, we said, When are you going to file  
5 a motion?

6 The answer is, The mandate had not yet issued, so we don't  
7 know.

Okay, let's assume the mandate  
8 is going to issue, can you please tell us when you'll file  
9 that motion after the issuance of the mandate? We don't have  
10 any authorization to tell you that.

11 We said, are you going to seek this on an  
12 expedited approval, seek expedited approval? We can't tell  
13 you that.

14 We are prepared as the debtor to sit down with  
15 whoever is approved by the Court, with the scope that's  
16 determined by the Court, immediately to help that examiner  
17 get up to speed. We are not, as Mr. Hackman suggested,  
18 seeking to take over the role of examiner. We have read the  
19 Third Circuit's decision, but we also read Section 1104(d),  
20 which says consultation. The word consultation means a  
21 conversation, not an interrogation, and it doesn't mean  
22 silence on the other side.

23 So where we stand today, Your Honor, is we have no  
24 idea what the U.S. Trustee is thinking about anything because  
25 they have very clearly told us, and now they have told the

1 Court, they have no intention of sharing that with us  
2 whatsoever. We don't really think that's consultation.

3 That being the case, what we think right now is  
4 that there should be an order entered. It should say that  
5 the -- we're fine with it saying that the U.S. Trustee is  
6 directed to appoint, but it is subject to approval of the  
7 Court and it is, as you said at the last status conference  
8 and as we believe to be the case, this will be on notice, we  
9 will have -- all parties in interest will have the right to  
10 say whatever they'd like to say with respect to whoever is  
11 selected in this black box, Kafkaesque exercise run by the  
12 United States Trustee, notwithstanding the clear language of  
13 the statute, and we will have whatever rights we have to say  
14 about scope, duration, cost, and the like.

15 We were asked specifically on the phone call what  
16 did we think of scope, duration, degree, and cost, and we  
17 said that we were in alignment with what Your Honor stated at  
18 the last status conference, which is that this should be 30  
19 to 45 days, this should first look at the things that have  
20 already been done by whoever has done them, and determine  
21 whether or not those things that have been done were done  
22 appropriately and, if there's anything else left to be done,  
23 what is left to be done and how is that going to benefit the  
24 estates.

25 We said that and we said to the United States

1 Trustee, do you have a reaction to that? No, we don't. No  
2 answer, we're not authorized to tell you anything.

3 So, Your Honor, we're happy to have the order  
4 entered and have a hearing, on appropriate notice with the  
5 ability to review and comment, not just for that, but all the  
6 parties in interest, and to do it at the 13th or the 20th, or  
7 whatever the Court is available. And at that point in time,  
8 you know, once we know the secret, we'll be able to then have  
9 some intelligent conversation perhaps with the U.S. Trustee's  
10 Office, but certainly with respect to our pleadings and  
11 arguments to the Court.

12 So I think it's pretty simple. I think if you  
13 took our order and said the United States Trustee is hereby  
14 directed to appoint an examiner, on notice -- I'm sorry,  
15 subject to Court approval, on notice, is directed to file a  
16 motion on notice to the parties seeking the -- hereby  
17 directed to appoint an examiner, subject to Court approval,  
18 and directed to file a motion on notice to the parties in  
19 interest setting forth the proposed scope, degree, cost, and  
20 duration of the examination to be conducted by such person.

21 That is our suggestion on how to deal with it. We  
22 are not looking to go again to the Third Circuit on these  
23 issues; we want to move this along quickly. We would like  
24 the U.S. Trustee to look at Webster's and see what  
25 consultation says and how it's defined. But, Your Honor, I

1 think that solves the problem for the moment, and then we can  
2 be back in front of you next month and talk about everything  
3 else.

4 THE COURT: All right. Thank you.

5 Mr. Hackman? Oh, I'm sorry.

6 MR. PASQUALE: May I, Your Honor?

7 THE COURT: Yes.

8 MR. PASQUALE: Just very quickly, Ken Pasquale  
9 from Paul Hastings for the committee.

10 Your Honor has already said, I don't think you're  
11 happy with either form of order. We're agnostic on the  
12 order, on the two that were submitted, we think they both go  
13 to the same effect at the end of the day. I did want to  
14 mention, however, we do agree, and I think Your Honor has  
15 said it, I don't really think there's a dispute but, to the  
16 extent that there is, we certainly as the committee want an  
17 opportunity to be heard in response to a motion to the Court  
18 on the examiner's appointment, and on the scope, duration,  
19 and cost of the investigation. But I think I heard Your  
20 Honor already say that, but I wanted it to be clear.

21 THE COURT: Okay. Thank you.

22 MR. PASQUALE: Thank you, Your Honor.

23 THE COURT: Thank you.

24 MR. HARVEY: Good afternoon, Your Honor, and may  
25 it please the Court, Matthew Harvey from Morris, Nichols,

1 Arsh & Tunnell on behalf of the ad hoc committee. We'd echo  
2 the official committee's comments. We're, again, agnostic on  
3 the form of order, but would like the opportunity to weigh in  
4 at the hearing on the application or the motion, Your Honor.

5 Thank you.

6 THE COURT: Okay. Thank you.

7 MR. HACKMAN: Thank you, Your Honor, Ben Hackman  
8 for the U.S. Trustee.

9 Your Honor, I generally don't have an issue with  
10 -- I would have to see the order, but what I believe Mr.  
11 Bromley said was he was agreeable to the order directing the  
12 U.S. Trustee to appoint, and that is what we want. We are  
13 not required to tell the debtors who we've been interviewing;  
14 we do not need to tell them who has been giving us  
15 expressions of interest.

16 THE COURT: Well, what does it mean in 1104(d)  
17 when it says after consultation with interested parties, what  
18 does that mean? It has to mean something.

19 MR. HACKMAN: So in Capital Services and  
20 Investments, Inc., it's 90 B.R. 383, 385 (Bankr. C.D. Ill.  
21 1988), the court wrote that consultation is not defined in  
22 the Bankruptcy Code. The dictionary defines consult as to  
23 seek advice or information from, or guidance from.

24 Consultation -- and then further down it says,  
25 consultation with parties in interest is required to apprise

1 the United States Trustee of the special requirements of the  
2 case.

3 Respectfully, it does not require us to waive  
4 deliberative process; it does not require us to tell the  
5 debtors what we're thinking. So we would reserve all rights  
6 on that issue.

7 When our office moved for an examiner originally,  
8 Mr. Bromley scoffed at the United States Trustee for wanting  
9 bleach and sunshine during the exam -- in requesting that  
10 relief. The debtors complained to the District Court and the  
11 Third Circuit that the U.S. Trustee was on a, quote, "policy  
12 crusade," end quote, in seeking an examiner. They complained  
13 to the Third Circuit at oral argument that the U.S. Trustee  
14 wanted to, quote, "boil the ocean," end quote. They  
15 criticized the Third Circuit's decision after it came down  
16 and announced it had erroneous dicta in it. They told the  
17 U.S. Trustee at last month's status conference that he should  
18 sit down and be quiet and take the win. And today they're  
19 referencing this process as Kafkaesque.

20 The Third Circuit wrote in its opinion that the  
21 examiner's requirement of disinterestedness, quote, "is  
22 particularly salient here where issues of potential conflicts  
23 of interest arising from debtors' counsel serving as  
24 prepetition advisers to FTX have been raised repeatedly. In  
25 enacting subsection 1104(c)(2), Congress made certain that

1 neither the Bankruptcy Court, nor the appellees, could deem  
2 these issues unworthy of an outside investigation in this  
3 particular bankruptcy," end quote.

4 So, Your Honor, I -- and one other thing. To be  
5 clear, our expectation is that when we file -- once Your  
6 Honor enters an order, assuming Your Honor enters an order  
7 directing us to appoint an examiner, we would file an  
8 application under 2007.1(c) that seeks approval of the  
9 appointment, that lays out what the proposed scope, cost, and  
10 duration would be, and parties in interest would have an  
11 ability to be heard at the hearing on that application.

12 Unless Your Honor has any questions for me, that's  
13 all I have.

14 MR. BROMLEY: Your Honor, may I?

15 THE COURT: Go ahead, Mr. Bromley.

16 MR. BROMLEY: I just want to object in the  
17 strongest terms possible to Mr. Hackman's reference to  
18 anything relating to my law firm. As Mr. Hackman knows, his  
19 office withdrew an objection to our retention and agreed that  
20 the firm is disinterested, and for Mr. Hackman today to say  
21 anything otherwise is completely inconsistent with the  
22 record. And the statement of his colleague from the  
23 Department of Justice Appellate Division at oral argument in  
24 front of the Third Circuit was equally erroneous. We just  
25 want to make that clear on the record.

1                   The U.S. Trustee's Office withdrew their objection  
2 and agreed to the entry of the order; that is the record.

3                   THE COURT: Okay.

4                   (Pause)

5                   THE COURT: All right. Well, I think -- one  
6 issue, I think, is clear, that the order should say that the  
7 U.S. Trustee is appointing the examiner. They have the  
8 ability to select the examiner and appoint them subject to  
9 Court approval. That should be in the order as well, subject  
10 to Court approval.

11                  Rule 2007.1(c) only addresses the question of the  
12 actual appointment; it doesn't talk about scope, duration,  
13 costs of any investigation to be conducted by the examiner.  
14 It says, an order approving the appointment of a trustee or  
15 examiner under 1104(d) of the Code shall be made on  
16 application of the United States Trustee. The application  
17 shall state the name of the person appointed and, to the best  
18 of the applicant's knowledge, all the person's connections  
19 with the debtor, et cetera, et cetera. The application shall  
20 state the names of the parties in interest with whom the  
21 United States Trustee consulted regarding the appointment.

22                  Who have you consulted with, Mr. Hackman?

23                  MR. HACKMAN: Your Honor, we've consulted with the  
24 debtors, the official committee, the ad hoc committee, the  
25 joint official liquidators, state agencies who had originally

1 filed joinders to the motion for an examiner. There have  
2 been others. We would state who all the people we've  
3 consulted with are in the application.

4 THE COURT: Okay. And did you say you've already  
5 selected somebody?

6 MR. HACKMAN: I don't know that I'm authorized to  
7 comment on that, Your Honor. I think --

8 THE COURT: Well, you can say whether you did --  
9 you've selected someone or not.

10 MR. HACKMAN: I'm sorry, Your Honor?

11 THE COURT: You can say whether you've selected  
12 someone or not. There's nothing in the Code that says you  
13 can't tell me whether or not you've selected somebody.

14 MR. HACKMAN: So I don't know if the final  
15 decision has been made at this point. My understanding is  
16 that once there is an order directing us to appoint, that  
17 will be finalized, and an application will be ready in short  
18 order. I -- yeah.

19 THE COURT: Well, how much time are we talking  
20 about here? Because, otherwise, I'm going to give you a  
21 time.

22 MR. HACKMAN: If Your Honor were to enter an order  
23 today, I would expect early next week we could have an  
24 application filed, by Monday or Tuesday.

25 THE COURT: All right. Then 2007.2 goes on to

1 say, the application shall be accompanied by a verified  
2 statement of the person appointing setting forth the person's  
3 connections with the debtor, et cetera, et cetera, but  
4 nothing about scope, duration, and cost of the investigation.

5 So there's nothing in the Code that tells me how  
6 to do that part of this. All the Code talks about is the  
7 appointment of the examiner.

8 So the order, I think, should be along the lines  
9 of what Mr. Bromley was talking about that the U.S. Trustee  
10 shall appoint, subject to Court approval, an examiner. The  
11 U.S. Trustee will also file a motion seeking approval of the  
12 scope, duration, and cost of any investigation to be  
13 conducted by that examiner. And that will be put out on  
14 notice, so that parties can be heard on those issues.

15 Does that make sense? Did I forget something?

16 MR. HACKMAN: Your Honor, just so I'm clear, there  
17 would be one application under 2007.1(c) that addresses  
18 appointment, as well as scope, duration, and costs, is that  
19 what Your Honor is saying, or do you want separate --

20 THE COURT: Well, 2007.1 does not address the  
21 issue of scope, duration, and costs. It just says the  
22 appointment and that you have to submit information to show  
23 who you consulted with and that the person has no conflicts  
24 or they're disinterested. So it doesn't address that issue.

25 So the question is -- and I'm thinking out loud

1 here -- do I do that as a part of a 2007.1 order, or do I  
2 have you file a separate motion seeking the scope, duration,  
3 and costs of the investigation. I know we've done this  
4 before. In Cred Inc. we did it as a two-step process, right?  
5 We did the appointment and then we had a separate -- was  
6 there a motion that was filed in Cred Inc. on the scope,  
7 duration, and costs?

8 MR. HACKMAN: I'm not entirely sure, Your Honor,  
9 but I believe it was a two-step process.

10 THE COURT: Ms. Richenderfer, do you recall?

11 MS. RICHENDERFER: Good afternoon, Your Honor,  
12 Linda Richenderfer from the Office of the United States  
13 Trustee. I do believe that there was first the application  
14 and then -- with the name of the examiner, and then there was  
15 a second document that was filed, I think it was even called  
16 -- it might even have been called a notice because the plan,  
17 the work plan, if you will, was put together to a great  
18 degree by the examiner in that case.

19 And when we talked about this at the status  
20 conference before, Your Honor noted that you wanted to -- I'm  
21 just looking at page 25 -- you said you wanted to shortcut  
22 the process a bit. And so you gave us your preliminary views  
23 on what you thought should be the scope, I think duration  
24 also, and even -- I think you even mentioned, yeah, about a  
25 low-seven-figure number was what you said. So you talked

1 about addressing all of those together in one document.

2 So I think we anticipated filing an application as  
3 soon as possible, hopefully hearing it before Your Honor on  
4 the 13th of March, and it would include the identity and  
5 would also address scope, duration, and cost. So then the  
6 issue is teed up for Your Honor. And people can put their  
7 thoughts and comments in documents filed with the Court  
8 and/or during the hearing, because we have what Your Honor  
9 has said about this and I think that, you know, this is  
10 information that everyone will be taking into account what  
11 Your Honor said about scope, duration, and cost, mindful of  
12 what the Code says. The Code says that shall appoint -- and  
13 I forget the exact language that follows, but basically the  
14 discretion regarding the scope --

15 THE COURT: Shall appoint subject to Court  
16 approval, I think.

17 MS. RICHENDERFER: Subject to Court approval,  
18 that's right, Your Honor. And so that's what -- without Your  
19 Honor's order, we don't have the authority to appoint  
20 anybody. Once we get Your Honor's order, the simple order we  
21 were seeking directed by the Third Circuit, we can appoint,  
22 and then we could file all of the information and everyone  
23 can do what they want to do with it.

24 The consultation, we've received very good  
25 comments from everybody. Debtors, we received some comments,

1 and we tried to take all the comments into consideration. So  
2 the consultation has occurred; if they don't like the  
3 results, Your Honor gets to decide it, I guess.

4 THE COURT: Well, I guess the question is only --  
5 on the appointment issue is does the person meet the  
6 requirements of the Code --

7 MS. RICHENDERFER: Right.

8 THE COURT: -- are they disinterested and are -- I  
9 guess --

10 MS. RICHENDERFER: All of that, Your Honor, will  
11 be in the application.

12 THE COURT: I mean, I guess if you tried to  
13 appoint somebody who I thought was completely inexperienced  
14 in the process or had no basis for being able to do this type  
15 of an investigation in the time frame necessary, but that --  
16 again, I go back to I might not know who this person is, I  
17 might need somebody else to tell me those things.

18 MS. RICHENDERFER: And, Your Honor, again, that's  
19 why we would hopefully submit it early next week. I say  
20 hopefully only because I plan to be on an island off the  
21 coast of Mexico next week where I can't be reached, but that  
22 it will be submitted next week, I should say, and then,  
23 again, listing it for the hearing on the 13th, I am sure that  
24 if anyone has anything to say we will all be hearing it.

25 THE COURT: Okay. So are we going to do this as a

1 motion? How are we going to -- I'm trying to figure out how  
2 we title this thing.

3 MS. RICHENDERFER: Yeah, application, Your Honor,  
4 is the word that's used throughout. So rather than the  
5 three-step process in Cred, which was motion for permission  
6 to appoint, and then Your Honor issued the order saying,  
7 okay, go appoint someone, we then filed the application, Your  
8 Honor issued the order for the appointment -- issued the  
9 order approving the appointment of that particular person,  
10 who in that instance was Mr. Stark from Brown Rudnick.

11 THE COURT: And that included the scope -- it did  
12 not include the scope, duration --

13 MS. RICHENDERFER: It did not because then there  
14 was a third submission, which in large part was developed by  
15 Mr. Stark himself, in addition with the United States  
16 Trustee. And I was not involved in that portion of it, there  
17 may have been some input from committee at the time, I don't  
18 know, but there was a very lengthy document and it included  
19 scope, it included a work plan, it included ideas about  
20 interviewing people. It was a very, very developed one.  
21 Here, I don't think, because of the length of time, that it  
22 can be even that developed in terms of allowing that much to  
23 occur because Your Honor has stated that you would like to  
24 see it limited to reviewing of the examiner report -- or the  
25 examinations that have already occurred. And then, if there

1 are issues, the examiner or others can come back to the Court  
2 and seek further time.

3 So I think that's what -- that's what we  
4 envisioned was taking steps two and three, combining them  
5 together, as Your Honor had suggested, and that's why we  
6 appreciated Your Honor's comments at the conference regarding  
7 what you thought an appropriate scope, duration --

8 THE COURT: Okay.

9 MS. RICHENDERFER: -- and cost would be.

10 THE COURT: So let me ask you this question:  
11 Since I entered an order denying the appointment of an  
12 examiner and I was reversed by the Third Circuit, the  
13 question is, do I need to enter an order saying that an  
14 examiner shall be appointed?

15 MS. RICHENDERFER: Yes, Your Honor, and that's all  
16 we were trying to accomplish with the form of order that we  
17 had submitted to the parties in interest. I don't have it  
18 right in front of me here now, and maybe it needed a little  
19 bit more wordsmithing or Your Honor would like some more  
20 wordsmithing.

21 THE COURT: Well, I think the debtors' version of  
22 it included an additional sentence at the beginning that says  
23 the motion of the United States Trustee for entry of an order  
24 directing appointment of an examiner is hereby granted. Your  
25 order just went right to that the U.S. Trustee is hereby

1 directed to appoint. I guess it's the same thing.

2 MS. RICHENDERFER: It's the same thing. I mean,  
3 you know, we tried to be low on the language because every  
4 time you write a word, other people have different ideas  
5 about what it means. So we got directly to the point, Your  
6 Honor. But, again, it's -- after the -- you know, just that  
7 you're directing us to appoint, that's all we need.

8 THE COURT: Right.

9 MS. RICHENDERFER: We need an order that says  
10 we're directed to appoint. And then the process breaks open,  
11 and hopefully we're back here then on the 13th and people can  
12 start.

13 THE COURT: Okay. So I think then the form of  
14 order should say something along the lines of that the United  
15 States Trustee is directed to appoint an examiner pursuant to  
16 Section 1104(d), subject to approval of the Court, and to  
17 include in the application the proposed scope, duration, and  
18 cost of the investigation to be conducted by the examiner.

19 MS. RICHENDERFER: Yes, Your Honor.

20 THE COURT: And I think that resolves the issue.

21 MS. RICHENDERFER: I think that would accomplish  
22 the purpose, yes.

23 THE COURT: Mr. Bromley?

24 MR. BROMLEY: Your Honor, I just -- I want to be  
25 careful because the -- you know, the scope, duration, cost,

1 that is related to 1104(c)(2), right? Because the Third  
2 Circuit said, well, what does as appropriate modify? The  
3 examination. All right?

4 So the application, with respect to scope,  
5 duration, cost, is not an application under Rule 2007.

6 THE COURT: Okay. So I think what we can do then  
7 is just include the United States Trustee shall appoint an  
8 examiner, pursuant to 1104(d) and pursuant to Section 11 --  
9 what is it, 1104 --

10 MR. BROMLEY: 1104(c)(2).

11 THE COURT: -- (c)(2), shall set forth in the  
12 application the proposed scope, duration, and cost.

13 MR. BROMLEY: That would work, Your Honor.

14 THE COURT: Okay.

15 MS. RICHENDERFER: Yeah, that's -- that was what  
16 we envisioned. It's a shame we got tied up in the  
17 wordsmithing here, but yes, Your Honor, I think that's the  
18 appropriate relief, and then we move from there.

19 THE COURT: Okay.

20 MR. BROMLEY: And, Your Honor, we do not have a  
21 hearing scheduled for the 13th, we have one scheduled for the  
22 20th, so -- so that's when the next hearing is scheduled.  
23 I'm not suggesting -- you know, if we're all planning on  
24 being here for the 13th, there's nothing on the calendar  
25 right now for the 13th. The 20th is fine?

1 MS. RICHENDERFER: Your Honor, we apologize. For  
2 some reason, we had an old -- we had something that looked  
3 like it was scheduled for the 13th and I guess that's -- the  
4 20th is fine.

5 THE COURT: Okay. Yeah, the 20th is the next one  
6 that I have.

7 MS. RICHENDERFER: Oh, the 13th is the interim fee  
8 application --

9 UNIDENTIFIED SPEAKER: It was pushed to the 20th.

10 MS. RICHENDERFER: -- and then that's bee pushed  
11 to the 20th --

12 THE COURT: Pushed to the 20th.

13 MS. RICHENDERFER: -- now. So that's why the 13th  
14 has come off and we're all going to be here on the 20th.

15 THE COURT: Okay. Is that fine? Is that an  
16 acceptable date, from the debtors' perspective?

17 MR. BROMLEY: That's acceptable for the debtors,  
18 Your Honor.

19 THE COURT: Okay. All right, so let's do that.

20 MR. BROMLEY: Thank you, Your Honor.

21 THE COURT: Okay. I think this is the longest  
22 I've spent on a one-paragraph order ever.

23 (Laughter)

24 THE COURT: All right. So just submit it under  
25 COC when you're ready. Okay?

1 Anything else then for today?

2 MR. LANDIS: That is all, Your Honor.

3 THE COURT: All right. Thank you all very much.

4 We're adjourned.

5 (Proceedings concluded at 2:21 p.m.)

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## CERTIFICATION

2                   We certify that the foregoing is a correct  
3 transcript from the electronic sound recording of the  
4 proceedings in the above-entitled matter to the best of our  
5 knowledge and ability.

6

7 | /s/ William J. Garling

February 22, 2024

8 | William J. Garling, CET-543

9 Certified Court Transcriptionist

10 | For Reliable

11

12 || /s/ Tracey J. Williams

February 22, 2024

13 | Tracey J. Williams, CET-914

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15 | For Reliable

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